

ORIGINAL

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BERT MEYER

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAR 24 2006
at 11 o'clock and 3 min. M
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BERT MEYER,)	Civil No.: 04-00049 JMS-BMK
)	(In Admiralty)
)	
Plaintiff,)	PLAINTIFF'S FIRST AMENDED
v.)	PRETRIAL STATEMENT
)	
MATSON NAVIGATION)	
COMPANY, INC., and)	
PACIFIC LIVESTOCK, INC.,)	
)	
)	
Defendants.)	
_____)	

COMES NOW PLAINTIFF BERT MEYER and submits the
following First Amended Pretrial Statement:

(a) **Party.**

This pretrial statement is filed on behalf of plaintiff Bert Meyer.

(b) Jurisdiction and Venue.

Venue exists in Honolulu because plaintiff was injured aboard the vessel S/S LIHUE at the Matson Terminal at Pier 52, Sand Island, Honolulu, Hawaii. Admiralty jurisdiction exists because the vessel was in navigable waters. There is no dispute over jurisdiction or venue.

(c) Substance of Action.

Plaintiff is a 38 year old longshoreman employed by McCabe, Hamilton & Renny Co., Ltd. He was injured aboard the Matson Navigation ship S/S LIHUE at 7:00 p.m. on October 1, 2002, when he slipped in animal waste and fell through a gap between the grating and the hatchcover on the starboard side of the hatchcover at row 15/16. He had been straddling a similar gap on the aft side of the hatchcover while using a long pole to unlock container cones above his head. He had to straddle the gap at the location where the slip began in order to properly position himself under a stuck cone on the three-high container that he was unlocking. He put his left foot on the padeye on the hatchcover (as he had done before) and his right foot was on the metal grating. There were animal feces, animal urine, and slime from the animal waste on all horizontal surfaces, including the grating and the hatchcover. Plaintiff complained about this to Daniel Farney, his Matson Terminals superintendent, prior to the accident. Plaintiff had

previously fallen due to animal slime aboard ship. His left foot slipped off the padeye and when he fell his left leg went into the 7 3/8" wide gap between the grating and the starboard (inshore) side of the hatchcover. He was stuck in the gap and later rescued by Mr. Farney. He sustained a massive labral tear of the left hip joint.

On October 16, 2003, plaintiff underwent left hip surgery with Dr. Thomas Kane which consisted of "resection of labral tear and extensive synovectomy." On April 7, 2005, Dr. Kane wrote that Meyer had an excellent recovery with "some acetabular posttraumatic arthritis." Mr. Meyer was unable to work from October 2, 2002, through May 23, 2003, and from September 12, 2004, through May 11, 2005, a total of 120 weeks and 1 day. He has a pain level of 3 on a scale of 10 in the left hip when he is not working and a pain level of 5 when he is working. He has returned to full duty longshoring.

(d) Undisputed Facts.

1. At the time of subject accident plaintiff was working as a longshoreman aboard the S/S LIHUE on October 1, 2002.
2. At the time of subject accident the S/S LIHUE was in navigable waters at Pier 52, Sand Island, Honolulu, Hawaii.

3. At the time of subject accident the crew of S/S LIHUE was employed by defendant Matson Navigation Company, Inc.
4. The animal tenders assigned to the S/S LIHUE for the voyage which arrived in Honolulu on October 1, 2002, were employed by defendant Pacific Livestock, Inc.

(e) Disputed Factual Contentions.

1. Whether defendant Matson Navigation Company, Inc. was negligent;
2. Whether defendant Pacific Livestock, Inc. was negligent;
3. Whether plaintiff was negligent;
4. The nature and extent of plaintiff's injuries.

(f) Relief Prayed.

\$ 67,229.80	past medical treatment
\$248,114.22	past wage loss
\$300,000.00	past pain and suffering
<u>\$300,000.00</u>	future pain and suffering
\$915,344.02	Total damages

(g) Points of Law.

- 1. DEFENDANT MATSON NAVIGATION COMPANY, INC. WAS NEGLIGENT**

A. Defendant Matson is Liable to Plaintiff Because it Failed to Turn Over the Vessel to the Longshoremen in a Reasonably Safe Condition. Scindia Steam Navigation Company, Ltd. v. De Los Santos, 451 US 156, 68 LEd 2d 1, 101 SCt 1614 (1981).

Scindia outlines the basic duties a vessel owes to longshoremen under 33 USC Sec. 905(b), the Longshore Act. Generally, a vessel owes the longshoreman the duty of exercising due care under the circumstances. Scindia, 68 LEd 2d 12.

A) TURN OVER DUTY. The turn over duty described in Scindia requires the vessel owner to exercise “ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its operations with reasonable safety to persons and property...” Scindia, 68 LEd 2d 12.

In other words, the shipowner must initially provide the longshoremen with a safe place to work, including functional equipment.

The unsafe conditions of the animal slime and the gap in the grating aboard the S/S LIHUE existed before the longshoremen came on board, therefore defendant breached its duty to turn the vessel over to the longshoremen in a reasonably safe condition. The failure to clean up the animal waste and the gap in the grating rendered the vessel unreasonably dangerous for an expert and experienced stevedore.

As the Senate Report quoted in Scindia makes clear, nothing in 1972 Amendments to the LHWCA “is intended to derogate from the vessel’s responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.” Scindia, 451 US at 169 n.16 (quoting S.Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972), also quoted by the Ninth Circuit in Bueno v. United States, 687 F2d 318, 320 (9th Cir 1983) as follows:

“So, for example, where a longshoreman slips on an oil spill on a vessel’s deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover, he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to

remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.” *Id.*, at 10-11.

The scenario in the Senate Report quoted in the Bueno case is strikingly similar to the facts of the instant case. Matson obviously knew that there was a large gap between the hatchcover and the grating, and knew or should have known of the animal waste, yet Matson took no corrective action, clearly violating the duties set forth by *Scindia* and the U.S. Senate.

The duty to make a vessel safe does not fall exclusively on the stevedore. Martinez, *supra*, at 610. A negligent shipowner’s liability is not eliminated by the negligence of the stevedore. Subingsubing v. Reardon Smith Lines, 682 F2d 779, 780 (9th Cir 1982).

B. Defendant Matson Breached its Scindia Duty to Safely Maintain Equipment Under its Control

The standard of care owed by vessels to longshoremen was established by Scindia Steam Navigation Co., Ltd. v. De Los Santos, 101 SCt 1614, 451 US 156, 68 LEd 2d (1981). Scindia held that a vessel may be liable for injuries to a longshoreman if the vessel “fails to exercise due care

to avoid exposing longshoremen to harm they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation” (emphasis added). 68 LEd 10. The insufficient grating was a permanent fixture supplied by the vessel. Permanent fixtures on a vessel are “equipment” under the vessel’s control, even in cargo areas. Taliercio v. Compania Expressa Lineas Argentina, 761 F2d 126 (2nd Cir 1985).

2. DEFENDANT PACIFIC LIVESTOCK, INC. WAS NEGLIGENT

Defendant Pacific Livestock employed two animal tenders to accompany the livestock aboard S/S LIHUE on its voyage to Honolulu. Part of their job was to wash down working areas. Obviously this did not happen.

Since the substantive law applicable in cases of admiralty jurisdiction is federal law, the federal courts, in the absence of a preemptive statute, are free to fashion federal common law remedies. Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 79 SCt 406, 3 LEd 2d 550 (1959). Accordingly, negligence is an actionable wrong under the general maritime law. The negligence cause of action was expressly recognized by the Supreme Court of the United States in the 1882 case, Leathers v. Blessing, 105 US (15 Otto) 626, 26 L.Ed 1192 (1882), which involved an *in personam*

action against the master and owners of a steamboat brought by a visitor injured aboard a vessel by a falling bale of cotton. In upholding this claim, the Supreme Court recognized the maritime tort of negligence which exists as a counterpart to state law negligence. As the court stated:

“[The term, ‘tort,’ when used in reference to admiralty jurisdiction, ...includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.”

Therefore, once admiralty jurisdiction is established all the substantive rules and precepts peculiar to the law of the sea become applicable; a plaintiff’s cause will be determined under principles of maritime negligence rather than common law negligence. Pope & Talbot, Inc. v. Hawn, 346 US 406, 74 SCt 202, 98 LEd 143 (1953).

From this beginning the maritime tort of negligence has developed into an all-purpose maritime law cause of action that cuts a wide swathe across all the specialized areas of admiralty law. The negligence cause of action may be invoked by virtually anyone who suffers injury or loss in an admiralty setting. Even the two categories of maritime workers who benefit from comprehensive liability schemes created by federal statute, seamen and longshore workers, may assert a cause of action for negligence under the

general maritime law against persons other than their employers. Hagerty v. L & L Marine Serv., Inc., 788 F 2d 315 (5th Cir 1986) (en banc clarification, 797 F 2d 256); and Albertson v. T. J. Stevenson & Co., Inc., 749 F 2d 223 (5th Cir 1984).

The elements of a maritime negligence cause of action are essentially the same as land-based negligence under the common law, free of “inappropriate common law concepts.” Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 630, 79 SCt 406, 409, 3 LEd 2d 550 (1959).

They include:

- (1) The existence of a duty required by law which obliges the person to conform to a certain standard of conduct in order to protect others against unreasonable risks.
- (2) A breach of that duty by engaging in conduct that falls below the applicable standard or norm. This breach is usually called by the rubric “negligence”; but “negligence” presumes the existence of element one, the standard of conduct.

(3) A reasonably close causal connection between the offending conduct and the resulting injury; this element is called “proximate cause.”

(4) Actual loss, injury, or damage suffered by the plaintiff. The burden of proof of these elements is on the plaintiff.

Johnson v. A/S Ivarans Rederi, 613 F 2d 334 (1st Cir 1980), cert dismissed 449 US 1135, 101 SCt 959 67 LEd 2d 325 (1981); Desmond v. Holland America Cruises, 1981 AMC 211 (SDNY 1981).

In admiralty the duty of care may be derived from three basic sources: (1) duly enacted laws, regulations, and rules; (2) custom; and (3) the dictates of reasonableness and prudence. Pennsylvania Railroad Co. v. The Marie Leonhardt, 202 F Supp 368, 375 (ED Pa 1962), affirmed 320 F 2d 262 (3rd Cir 1963).

In determining the existence of duty, a court must examine and weigh the probability of an accident, the potential extent of the injury, and the cost of adequate precautions. See Complaint of Paducah Towing Co., 692 F 2d 412 (6th Cir 1982); United States v. Carroll Towing Co., 159 F 2d 169 (2d Cir 1947), rehearing denied 160 F 2d 482 (2d Cir 1947).

Negligence is conduct which involves creating a risk of harm to others. Stated another way, negligence is conduct which fails to protect other people against an unreasonable risk of harm. Thus negligence is essentially a breach of the duty of due care. It is a failure to observe that degree of care, precaution, and vigilance which the circumstances demand, the failure to observe the ordinary degree of care which people of ordinary prudence would use under the same circumstances. Gallick v. Baltimore & Ohio Railroad Co., 372 US 108, 83 S Ct 659, 9 L Ed 2d 618 (1963). A finding of negligence must not be based upon speculation or conjecture. It may, however, be based upon direct or circumstantial evidence. Jastremski v. United States, 737 F 2d 666 (7th Cir 1984); Valentine v. United States, 630 F Supp 1126 (SD Fla 1986). When a claim is brought under maritime jurisdiction the sufficiency of the evidence of negligence is governed by federal law. Harrelson v. United States, 420 F Supp 788 (SD Ga 1976), affirmed 548 F 2d 353 (5th Cir 1977).

(h) Previous Motions.

Pacific Livestock, Inc.'s motion for leave to sue Matson Terminals, Inc. was denied.

(i) Witnesses To Be Called.

1. Bert Meyer – will testify about his accident, medical treatment, earnings, and his physical condition.
2. Daniel Farney – Matson Terminals superintendent will testify about circumstances of accident.
3. Eric Johnson – S/S LIHUE vessel master will testify about accident and vessel and Matson Navigation safety procedures.
4. H.G. Walsh – former chief mate on S/S LIHUE will testify about problems with animal tenders and wash down procedures.
5. Keahi Birch – Matson Navigation safety manager in Hawaii will testify about Matson's safety policies.
6. Paul Londynsky – Matson Navigation corporate safety director will testify about Matson's safety policies.
7. Henry Olson – Matson Navigation naval architect will testify about history and design features of S/S LIHUE.
8. Greg Kinnel – animal tender aboard S/S LIHUE employed by Pacific Livestock will testify about the wash down of animal waste on S/S LIHUE.
9. James Souza – McCabe longshoreman will testify regarding working conditions on the S/S LIHUE.

10. Armando Martinez – will testify about M/V SANDRA BLANCA and his job as a longshore crane operator.
11. John Robinette – Matson Navigation claims manager will authenticate Vessel Safety Inspection Report.
12. Heidi Kahlbaum – workers' compensation adjuster at Frank Gates Acclaim will testify about recorded statement from plaintiff, medical payments, and workers' compensation lien.
13. Raymond Antone – Matson Terminals superintendent will testify about preparation of accident report and accident.
14. Randolph Baldemor – will authenticate Vessel Safety Inspection Report.
15. Ernie Jose – workers' compensation adjuster at Frank Gates Acclaim will testify about cost of plaintiff's medical treatment and workers' compensation lien.
16. Kraig Kennedy – vice president of McCabe, Hamilton & Renny Co., Ltd. will verify plaintiff's wages.
17. Nalani Foreman – office manager at McCabe, Hamilton & Renny Co., Ltd. will verify plaintiff's wages.

18. Craig Kato – Matson Terminals stevedore superintendent will testify about conditions aboard the S/S LIHUE, stevedoring operations, and plaintiff's accident.
19. Tim Reinholdt – Matson Navigation mate will testify about conditions aboard the S/S LIHUE, stevedoring operations, and plaintiff's accident.
20. Pat Glenn – Matson Navigation mate will testify about conditions aboard the S/S LIHUE, stevedoring operations, and plaintiff's accident.
21. Carl Stein – Matson Navigation mate will testify about conditions aboard the S/S LIHUE, stevedoring operations, and plaintiff's accident.
22. Steven Kaneshiro, M.D. – plaintiff's treating physician will testify about plaintiff's medical treatment and condition.
23. Thomas Kane, M.D. – plaintiff's treating physician will testify about plaintiff's medical treatment and condition.
24. Capt. Robert Riley – plaintiff's safety expert will testify about safety issues involving plaintiff's accident.

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(j) Exhibits, Schedules, and Summaries.

1. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
2. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
3. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
4. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
5. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
6. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
7. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
8. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
9. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley

10. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
11. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
12. Photograph of S/S LIHUE
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
13. Photograph of S/S LIHUE (Port side)
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
14. Photograph of M/V SANDRA BLANCA
Shows proper gap between hatchcover and
lashing platform
Robert Riley, Armando Martinez
15. Photograph of M/V SANDRA BLANCA
Shows proper gap between hatchcover and
lashing platform
Robert Riley, Armando Martinez
16. Photograph of M/V MAERSK GIRONDE
Shows improper gap in lashing area
Robert Riley
17. Photograph of M/V MAERSK GIRONDE
Shows improper gap in lashing area
Robert Riley
18. Photograph of M/V R.J. PFEIFFER
Shows improper gap in lashing area
Robert Riley, Linda Morishige

19. Photograph of M/V R.J. PFEIFFER
Shows improper gap in lashing area
Robert Riley, Linda Morishige
20. Photograph of M/V R.J. PFEIFFER
Shows improper gap in lashing area
Robert Riley, Linda Morishige
21. Matson Terminals, Inc. Accident Report
for Meyer accident
Shows circumstances of accident
Bert Meyer, Raymond Antone, Robert Riley
22. Matson Navigation Company Safety and Pollution Manual,
Special Safety Precautions, Number C-01-100 dated
Oct. 15, 1998
Shows defendant's internal safety policies
Robert Riley
23. Matson Navigation Company Safety and Pollution Manual,
Working Aloft, Number C-01-190 dated July 5, 2000
Shows defendant's internal safety policies
Robert Riley
24. Pacific Coast Marine Safety Code, 1999 Revision
Shows industry standard and custom
Robert Riley
25. Pacific Coast Marine Safety Code, 2002 Revision
Shows industry standard and custom
Robert Riley
26. Pacific Coast Longshore Contract Document
July 1, 2002- July 1, 2008
Shows applicability of Pacific Coast Marine Safety Code
27. Webster's Encyclopedic Unabridged Dictionary of the
English Language
Shows definition of the word "deck"
Robert Riley

28. Accident Prevention On Board Ship at Sea and In Port,
ILO code of Practice
Shows industry standard and custom
Robert Riley
29. Code of Safe Working Practices for Merchant Seaman
(United Kingdom)
Shows industry standard and custom
30. ASTM F1637-02 Standard Practice for Safe Walking Surfaces
Shows safety standard
Robert Riley
31. SAE J185 JUN 88 Access Systems for Off-Road Machines
Shows safety standard for openings in deck
Robert Riley
32. ISO 11660-2 Cranes-Access, guards and restraints
Shows safety standard for openings in deck
Robert Riley
33. CV for Robert Riley
Shows qualifications
Robert Riley
34. Report of Robert Riley
Shows opinions
Robert Riley
35. CV of Thomas Kane, M.D.
Shows qualifications
Thomas Kane, M.D.
36. Medical Reports of Thomas Kane, M.D.
Shows course of plaintiff's medical treatment
Thomas Kane, M.D.

37. CV of Steven Kaneshiro, M.D.
Shows qualifications
Thomas Kaneshiro, M.D.
38. Medical Reports of Steven Kaneshiro, M.D.
Shows course of plaintiff's medical treatment
Steven Kaneshiro, M.D.
39. Recorded statement of Bert Meyer
Shows how-accident occurred
Bert Meyer, Heidi Kahlbaum
40. Matson's Response to Plaintiff's Interrogatories, Set No. One
41. Matson's Response to Plaintiff's Interrogatories,
Set No. Two
42. Matson's Response to Plaintiff's Interrogatories,
Set No. Five
43. Matson's Response to Plaintiff's Interrogatories, Set No. Six
44. Matson's Response to Plaintiff's Request for Production of
Documents, Set No. One
45. Matson's Response to Plaintiff's Request for Production of
Documents, Set No. Two
46. Matson's Response to Plaintiff's Request for Production of
Documents, Set No. Three
47. Matson's Response to Plaintiff's Request for Production of
Documents, Set No. Seven
48. Matson's Response to Plaintiff's Request for Production of
Documents, Set No. Eleven
49. Plaintiff's wage records
Show earnings
Bert Meyer, Kraig Kennedy, Nalani Foreman

50. Vessel Safety Inspection Report Matson Terminals, Inc.
Shows results of S/S LIHUE vessel inspection
Robert Riley, John Robinette, Randolph Baldemor
51. Excerpt from Merchant Marine Officers' Handbook
Shows cone
Robert Riley, Bert Meyer
52. Deposition of Eric Johnson
53. Deposition of Henry A. Olson
54. Deposition of Paul Londynsky
55. Deposition of Keahi Birch
56. Plaintiff's workboots
Show condition of soles
Bert Meyer
57. Anatomical chart of hip
Dr. Kaneshiro, Dr. Kane
58. Photograph of S/S LIHUE starboard side between rows
15 and 16
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
59. Photograph of S/S LIHUE port side between rows 15 and 16
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
60. Photograph of S/S LIHUE port side between rows 15 and 16
Shows conditions aboard S/S LIHUE
Bert Meyer, Robert Riley
61. Defendant Pacific Livestock, Inc.'s Response to Bert Meyer's
Interrogatories

- 62. Defendant Pacific Livestock, Inc.'s Response to Bert Meyer's Request for Production of Documents
- 63. Defendant Pacific Livestock, Inc.'s Response to Bert Meyer's Request for Admissions
- 64. Defendant Pacific Livestock, Inc.'s Response to Matson's Interrogatories
- 65. Defendant Pacific Livestock, Inc.'s Response to Matson's Request for Production of Documents
- 66. Defendant Pacific Livestock, Inc.'s Response to Matson's Request for Admission

(k) **Further Discovery or Motions.**

Matson has filed summary judgment motions against Bert Meyer and Pacific Livestock, Inc. which will be heard on April 17, 2006.

(l) **Stipulations.**

There are no stipulations.

(m) **Amendments, Dismissals.**

There are no proposed or requested amendments or dismissals.

(n) **Settlement Discussion.**

There was a private mediation with Harris Weinberg on January 11, 2006. There will be another mediation with Harris Weinberg on April 21, 2006.

(o) **Agreed Statement.**

Presentation of the action upon an agreed statement of facts is neither feasible or desired.

(p) **Bifurcation, Separate Trial of Issues.**

A bifurcation or separate trial of specific issues is neither feasible or desired.

(q) **Reference to Master or Magistrate Judge.**

Plaintiff is not agreeable to referring all or part of the action to a Magistrate Judge.

(r) **Appointment and Limitation of Experts.**

Court appointed experts and a limitation of experts is not feasible or desired.

(s) **Trial.**

The case has been scheduled for a non-jury trial on June 14, 2006.

(t) **Estimate of Trial Time.**

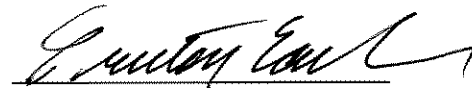
The trial is expected to take five court days.

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(u) **Claims of Privilege or Work Product.**

None of the matters covered by this rule are covered by work product or other privilege.

Dated: March 21, 2006

A handwritten signature in cursive script, appearing to read "Preston Easley", written over a horizontal line.

PRESTON EASLEY
Attorney for Plaintiff
BERT MEYER